



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: MAY 24, 2023

IN THE MATTER OF:

Appeal Board No. 628504 A

PRESENT: JUNE F. O'NEILL, MEMBER

The claimant Applied to the Appeal Board pursuant to Labor Law § 534 for a reopening and reconsideration of Appeal Board No. 623421, filed July 22, 2022, which affirmed the decision of the Administrative Law Judge and sustained the initial determination disqualifying the claimant from receiving benefits, effective October 10, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant prior to October 10, 2021, cannot be used toward the establishment of a claim for benefits .

Upon consideration of the application to reopen, after due notice to the parties, the Board has decided to reopen and reconsider its decision.

Based on the record and testimony in this case, the Board makes the following:

FINDINGS OF FACT: The claimant was employed as a direct care specialist for youth for over eight years. The director of the agency implemented a campus wide mandate, as of August 2021, wherein all staffers who chose not to be vaccinated against COVID-19, were required to submit to weekly COVID-19 testing. As of August 16, 2021, all employees were required to provide a copy of a negative COVID-19 test result to their supervisor, via email or hard copy, at the start of each employee's designated work week. This allowed for the employee to be given permission to work. The claimant was aware of this requirement and understood that she was to provide a copy of her test results each Sunday, the start of her work week. She would normally give them directly to her supervisor or place them in the box on her supervisor's door.

The claimant obtained COVID-19 test results on August 27, 2021, and August 31, 2021. She did not immediately provide the test results to the employer, via email or hard copy. Consequently, as of August 31, 2021, the employer met with the claimant to verbally remind the claimant of the testing policy. The employer's verbal warning required the claimant to provide results from weekly COVID-19 testing to the employer at the start of her work week, on Sunday. The employer warned the claimant that failing to provide weekly results could result in discipline up to and including termination.

The claimant, however, did not provide additional COVID-19 test results to the employer after that date. As a result, the employer met with the claimant to then issue a written warning to the claimant, dated September 16, 2021, for the claimant's failure to provide copies of her COVID-19 negative test results. The claimant refused to sign the written warning, arguing that she had been in full compliance with the testing schedule and had emailed copies of the results to the employer. The employer did not receive any such emails. Consequently, the employer suspended the claimant.

After the suspension, the claimant was out of work due to illness through October 2, 2021. She resumed work on Sunday, October 3, 2021, but did not provide the employer with a negative COVID-19 test. The claimant was tested for COVID-19 on October 4 but did not provide the negative test result to the employer until October 7, 2021. Consequently, on October 9, 2021, the employer's human resource officer discharged the claimant for her failure to provide a COVID-19 test at the start of her work week as required.

OPINION: The credible evidence establishes that the employer discharged the claimant for her failure to provide proof of her COVID-19 test on Sunday, October 3, 2021. Although the claimant alleged that she did not have an opportunity to obtain a COVID-19 test, we find her argument unpersuasive. In so concluding, we note that the employer had previously disciplined the claimant with a verbal warning, a written warning, and a suspension, for failing to comply with the employer's policy. Nevertheless, the claimant, upon her return to work on Sunday, October 3, 2021, resumed work without providing the employer with a test. The claimant offered no reasonable excuse but for she was busy. The claimant knew or should have known that her failure to provide the test results on Sunday, October 3, when she returned to work, would jeopardize her continued employment. Hence, we find that the claimant's failure to abide by the employer's reasonable request constituted misconduct.

Accordingly, we conclude that the claimant's separation was under disqualifying circumstances.

DECISION: The decision of the Appeal Board is rescinded.

The decision of the Administrative Law Judge is affirmed.

The initial determination, disqualifying the claimant from receiving benefits, effective October 10, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant prior to October 10, 2021, cannot be used toward the establishment of a claim for benefits.

The claimant is denied benefits with respect to the issues decided herein.

JUNE F. O'NEILL, MEMBER